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10 UNITED STATES DISTRICT COURT
11
12 NORTHERN DISTRICT OF CALIFORNIA
13
14 SAN FRANCISCO DIVISION

15 Nichia Corporation,

16 Plaintiff,

17 v.

18 Seoul Semiconductor Co., Ltd., Seoul
Semiconductor, Inc.,

19 Defendants.

No. 3:06-CV-0162 (MMC)

**DEFENDANTS' SEOUL
SEMICONDUCTOR CO., LTD. AND
SEOUL SEMICONDUCTOR, INC.'S
OPPOSITION TO NICHIA
CORPORATION'S MOTION FOR
SUMMARY JUDGMENT OF
PATENT INFRINGEMENT,
VALIDITY AND SEOUL'S
EQUITABLE DEFENSES**

Date: July 27, 2007
Time: 9:00 a.m.
Place: Courtroom 7, 19th Floor
Judge: Hon. Maxine M. Chesney

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24 **REDACTED VERSION -**
25 **ORIGINAL FILED UNDER SEAL**
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1 I. INTRODUCTION

2 In two separate opinions, the U.S. Supreme Court recently reaffirmed that the
 3 U.S. Patent Act was designed to promote, not stifle, innovation. They were told they could not
 4 appropriate for exclusive use obvious solutions to known problems. Parties were warned against
 5 extending the reach of U.S. patent laws beyond the boundaries of the United States. This
 6 mandate is equally, if not more, applicable to design patents. Design patents, by definition, are
 7 limited in scope to new, original and ornamental designs for articles of manufacture. 15 U.S.C. §
 8 171.

9 Plaintiff Nichia Corporation's attempt to win this case on summary judgment
 10 blatantly ignores these instructions. It seeks to use a trumped up, under false pretenses purchase
 11 of Seoul's LEDs in the United States and four narrow design patents to obtain a worldwide
 12 monopoly on side view LEDs, which are exclusively manufactured and sold abroad. To do so,
 13 its motion relies almost exclusively on a liability expert who had no experience in LEDs before
 14 this case, who has never purchased an LED, who was given almost no documents to review and
 15 read almost no deposition testimony, and who, by his own admission, is neither an ordinary
 16 observer nor one of ordinary skill in the art, prerequisites to opine on infringement and
 17 invalidity.

18 Nichia's strategy should be rejected. Nichia's patents are invalid, and Seoul does
 19 not infringe them. This Court should determine, on claim construction, that the majority, if not
 20 all, of the features of the patents in suit are functional. If any ornamental features remain, Seoul
 21 does not infringe them.

22 At a minimum, Nichia's factual argument that Seoul committed acts of direct
 23 infringement in the United States is disputed. Nichia's position that its patents are not
 24 anticipated, obvious and/or functional is hotly contested by Seoul's expert. And Nichia's claim
 25 that its own unclean hands should be erased on summary judgment is wrong. For these reasons,
 26 as described more fully below, this Court should deny Nichia's motion for summary judgment.

1 **II. STATEMENT OF ISSUES**

2 Nichia's motion presents six issues:

3 **Direct Infringement:** Is Nichia entitled to summary judgment on direct
4 infringement?

5 **Invalidity - Anticipation:** Is Nichia entitled to summary judgment on Seoul's
6 invalidity defense based on anticipation?

7 **Invalidity - Obviousness:** Is Nichia entitled to summary judgment on Seoul's
8 invalidity defense based on obviousness?

9 **Invalidity - Functional:** Is Nichia entitled to summary judgment on Seoul's
10 invalidity defense based on functionality?

11 **Unclean Hands:** Is Nichia entitled to relief in light of Seoul's unclean hands
12 defense?

13 **De Minimis:** Is Nichia entitled to summary judgment on Seoul's *de minimis*
14 defense?

15 **III. SUMMARY JUDGMENT FOR SEOUL, NOT NICHIA, IS**
16 **WARRANTED ON NICHIA'S DIRECT INFRINGEMENT CLAIM**

17 Nichia cannot meet its burdens under either the *Gorham* "ordinary observer" or
18 *Litton* "point of novelty" tests for infringement. To prove infringement, it must satisfy both.
19 *Contessa Food Prods., Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1377 (Fed. Cir. 2002); *Bernhardt,*
20 *LLC v. Collezione Europa USA*, 386 F.3d 1371, 1378 (Fed. Cir. 2004). Accordingly, the Court
21 should grant Seoul, not Nichia, summary judgment on Nichia's direct infringement claim. In the
22 alternative, at a minimum, there are material disputed issues of fact and the Court should deny
23 Nichia's motion.

24 **A. No Ornamental Features: Summary Judgment for Seoul**

25 The *Gorham* test, as Nichia concedes, "compares only the ornamental features,
26 not the functional features." (Nichia's Motion for Summary Judgment ("Nichia Mot.") at 7).
27 Nichia fails the *Gorham* "ordinary observer" test as a matter of law. Nichia's patented designs
28 are for "light emitting diodes," and all of the features claimed are functional. *See* Seoul's Motion

1 for Summary Judgment (“Seoul Mot.”) § IV.D.3. and *see* § VI below. As a result, there are no,
 2 let alone substantial, similarities of any *ornamental* features.

3 **B. No Evidence of Deception: Summary Judgment for Seoul**

4 Even if there were some ornamental features, Nichia does not apply the *Gorham*
 5 test properly. *Gorham* says that “two designs are substantially the same” if the resemblance is
 6 such “as to deceive . . . an [ordinary] observer, inducing him to purchase one supposing it to be
 7 the other . . .” *Gorham Co. v. White*, 81 U.S. 511, 528 (1871).

8 Nichia recites no evidence that any “ordinary observer” was ever, or ever would
 9 be, deceived into purchasing Seoul’s 902 series LED (Type I or Type II, to use Nichia’s
 10 nomenclature) supposing it to be Nichia’s patented design. Nichia’s expert, Woodring, never
 11 said anything about any deception. Actually, the evidence on this issue, which Nichia does not
 12 bring to the Court’s attention, cuts against Nichia.

13 Testimony from typical “ordinary observers” who work for Hyundai LCD and
 14 Namotek confirmed that they do not consider the appearance in purchasing and selecting LEDs
 15 and therefore could not be deceived by any ornamental features. *See* Ex. 7, Tr. 21:9-24:3, 31:11-
 16 32:8, 48:22-49:16 (B.G. Kim); Ex. 9, Tr. 39:23-40:1, 41:16-18, 45:13-24, 50:1-24 (J.J. Kim).¹
 17 Additionally, Dong Hwan Lee, a real-world “ordinary observer” who works for Samsung SDI –
 18 one of the world’s largest LCD/LCM manufacturers –

19 Ex. 12, Tr. 107:4-14 (D. Lee). He said that

20 . . . *Id.* at 125:2-126:19.

21 Without evidence of deception based on ornamental features, Nichia cannot show
 22 Seoul’s 902 series LEDs are substantially the same and survive summary judgment for Seoul on
 23 this issue. *See, e.g., OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1405 (Fed. Cir.
 24 1997); *Elmer v. ICC Fabricating*, 67 F.3d 1571, 1577 (Fed. Cir. 1995).

25
 26
 27 ¹ Jeong Ju Kim, an employee of Namotek, testified that BLU manufacturer Namotek
 28 purchases LEDs from both Seoul and Nichia. Ex. 9, Tr. 32:9-16 (J.J. Kim).

C. No Appropriation of Ornamental Point of Novelty: Summary Judgment for Seoul

Nichia also cannot meet *Litton's* "point of novelty" test. Nichia admits that the package or body of the LEDs claimed in Nichia's '538 and '784 patents is part of the prior art. *See* Ex. 3, 161:25-162:18 (Fla.); Ex. 13, 94:15-26, 170:5-9 (Sai.); Ex. 18, Tr. 84:4-12, 84:23-85:6, 89:2-19, 90:7-11, 115:13-116:8, 205:1-5 (Woo). As a result, as Nichia admits, the only possible source of novelty is the electrodes. Ex. 15, Tr. 135:11-17 (Sch.) ("[F]eatures of the LED body are not a point of novelty."). With respect to them, Nichia, citing its expert Woodring, only asserts "points of novelty" as to their shape and spatial arrangement. (Nichia Mot. at 12). Most of what Woodring claims is novel, however, is not. The little that remains is undisputedly functional and not appropriated.

Woodring's Opinion May Be Disregarded: In the first place, Woodring's opinions as to ornamentality, functionality, and points of novelty must be disregarded. Nichia's expert

See Ex. 18, Tr. 157:5-158:1 (Woo.); *see* Seoul's Motion to Exclude the Testimony of Cooper C. Woodring ("Mot. to Exclude")²; *see below* § III.D.

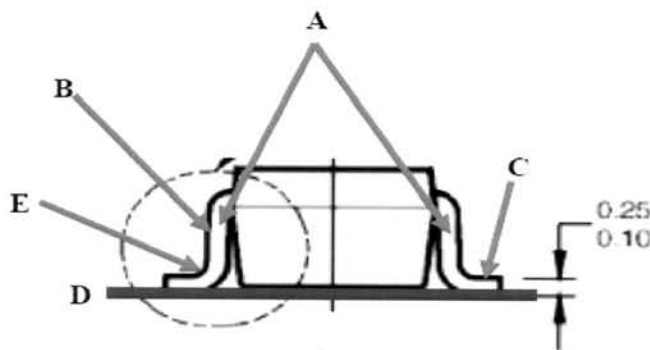
'338 & '385: Spatial Arrangement Not Claimed. Either way, as Nichia concedes, in a design patent

(Nichia Mot. at 8). Nichia's '388 and '385 patents disclaim the body by using broken lines. *See also* Ex. Y, (Dep. Exs. 17, 18) to the Declaration of Chi Soo Kim in Support of Seoul Semiconductor Defendants' Motion for Claim Construction and for Summary Judgment ("Kim Decl."). Accordingly, as to these two patents spatial arrangement with respect to the body is not claimed. Therefore, Seoul as a matter of law could not have "appropriated" anything about

² Seoul is separately moving to exclude the testimony of Woodring because (1) he is not qualified to testify as an expert in this matter and his testimony is not based on sufficient facts or data; (2) as an ordinary observer; and (3) as one of ordinary skill in the art. *See* Seoul Mot. to Exclude.

1 the spatial arrangement.

2 **‘538 & ‘784: Spatial Arrangement Not Point of Novelty:** Spatial arrangement
 3 of LEDs is functional and whether it is a point of novelty is therefore irrelevant. Regardless,
 4 with respect to Nichia’s ‘538 and ‘784 patents, virtually everything Woodring claimed novel
 5 about spatial arrangement is in fact not a point of novelty. Using Woodring’s “verbalizations,”
 6 Nichia’s own ‘215 device, which it admits is prior art, had “legs extending below the ends of a
 7 raised bottom surface of the body.” Ex. 19, (Woo. Inf. Rpt.) at 7, to the Declaration of Kenneth
 8 E. Krosin in Support of Plaintiff Nichia Corporation’s Motion for Summary Judgment (“Krosin
 9 Decl.”). Additionally, the SC70, a package available several years before Nichia’s priority date,
 10 disclosed (1) “two spaced apart substantially right angled, L shaped brackets each (“A” in
 11 diagram below) having a vertical leg (“B”) and a substantially horizontal leg (“C”) and being
 12 flush with the body’s bottom surface (“D”), joined by a curved radius” (“E”) and (2) the height
 13 of vertical legs being a majority of the LED’s height.”³



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19 Fla. Reb. Rpt. at 23-28.

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21 Moreover, the ‘106 patent issued on June 1, 1993 also previously disclosed
 22 “L shaped” bookends that depict nearly identical rounded free corners on the vertical leg. *See*
 23 below.

24 **Rearward Facing is Functional:** The undisputed evidence shows that the
 25 rearward facing “spatial arrangement” of the electrodes is functional. *See* § IV.B.3.C. below.

26
27 ³ Nichia’s Motion for Summary Judgment, at 18, inappropriately and arbitrarily mixes
 28 various views of SC70 and its design to confuse the issue.

Nichia's citation to a Seoul patent showing forward facing does not alter this conclusion. There is no evidence that Seoul ever commercially manufactured or sold any LED with such forward facing electrodes or that this design was commercially feasible. Indeed, Seoul's patented design was not commercially altered precisely because it was not as functionally desirable as the rearward facing design. *See* Declaration of Dae Hyun Chang in Support of Seoul's Motion for Summary Judgment ("Chang Decl.") at ¶ 3.

Curved Corner Not Appropriated: Even if Nichia's curved corners were not part of the prior art (not-qualified-expert Woodring calls them "free corner removed"), Seoul's electrodes are clipped and angled (a.k.a. chamfered) and therefore do not appropriate this aspect of Nichia's designs. Ex. 19, (Fla. Reb. Rpt.) at 27-28.⁴

D. At a Minimum There Are Disputed Issues

If summary judgment for Seoul is not warranted on any of the above grounds, then there are at a minimum disputed issues that prevent summary judgment for Nichia, principally whether similarities and differences render Seoul's 902 series "substantially the same" as Nichia's patented designs. There are major differences between Seoul's 902 series LED and Nichia's '538 and '784 patents.

Opposing Expert Opinions: Nichia's expert Woodring claims that Seoul "copied" Nichia and that Seoul's 902 series LEDs are "substantially the same" as Nichia's patents. Krosin Decl., Ex. 19, (Woo. Inf. Rpt.) at 8, 12-18. Seoul's expert Richard Flasck concluded that "three major features - the window, electrodes and the recessed rectangles - are different than those depicted in the patents in suit." Ex. 19, (Fla. Reb. Rpt.) at 15. Accordingly,

⁴ Indeed, Nichia
Ex. HH, (Dep. Ex. 78)

Kim Decl.,
); Ex. 11, Tr. 48:14-50:4 (Kis.); Ex. 17, Tr. 100:1-
101:3, 104:5-11 (Tom.)
.. Ex. 11, Tr. 39:19-40:4 (Kis.); Ex. 15, Tr.
135:18-136:21 (Tom.).

he opined that Seoul's devices are not substantially the same. *Id.* at 14-15.

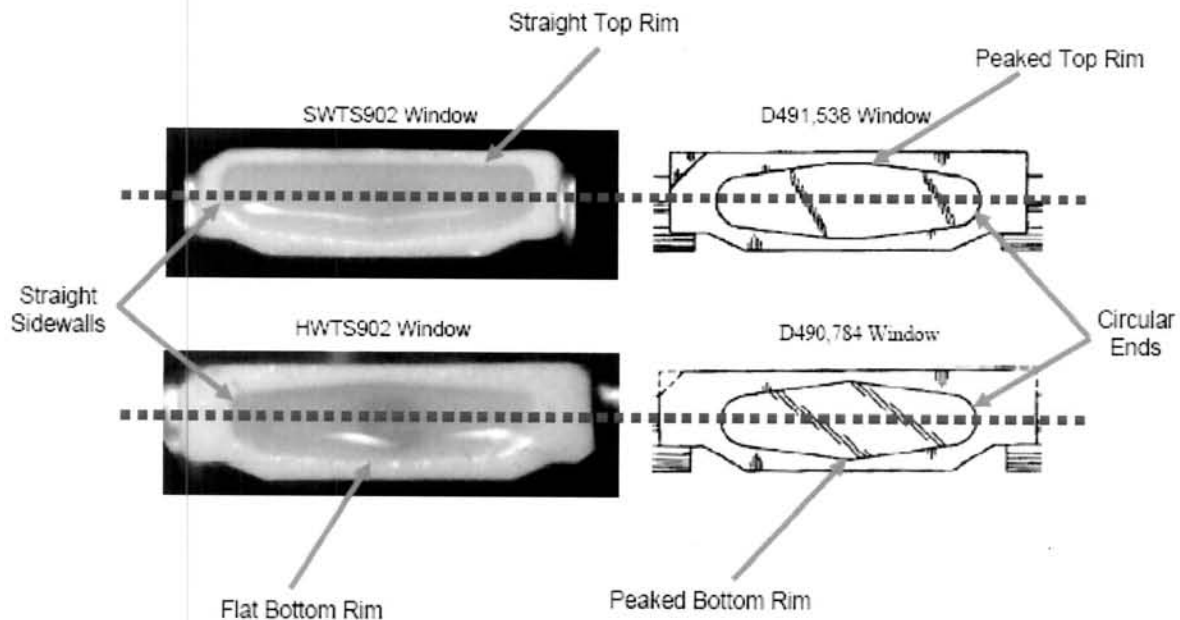
Even if Woodring is qualified (he is not), and his opinions were supported by evidence (they are not), *see* Seoul's Mot. to Exclude, the conflict between these opposing experts is at least enough to create genuine disputes over material facts as to whether the two designs are "substantially the same" to an "ordinary observer." Ex. 3, Tr. 6:2-13:4 (Fla.). Indeed, Nichia's assertion that the

(Nichia Mot. at 9), is wrong. There are, as, Seoul's expert Flasck illustrates, major differences.

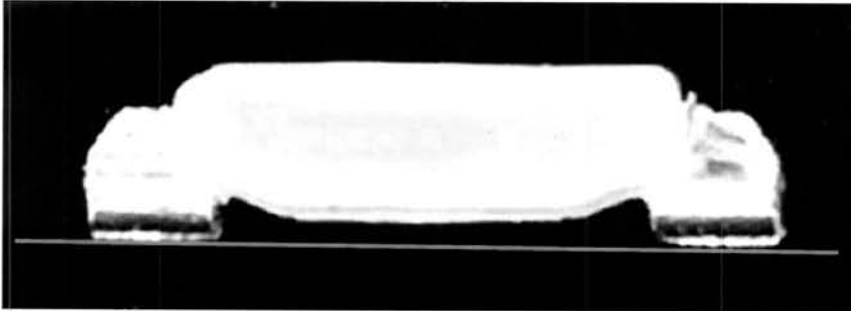
Seoul's 902 v. Nichia's '538 and '784: Nichia's '538 patent claims an opaque window. *See* Ex. 3, Tr. 83:9-13; 98:8-15; 207:20-208:1 (Fla.); Ex. 18, Tr. 125:3-5 (Woo.); Kim Decl., Ex. JJ (Dep. Ex. 22). Seoul's HWTS902 (Type I) and SWTS902 (Type II) have translucent, not opaque, windows. Ex. 3, Tr. 207:22-208:1 (Fla.); Ex. 18, Tr. 125:6-24 (Woo.). Additionally, the shapes of the windows in Seoul's series 902 LEDs are different than those claimed by Nichia's '538 and '784 patents. Nichia admits

(Nichia Mot. at 5-6);

Ex. 3, Tr. 207:10-14 (Fla.); Ex. 15, Tr. 97:22-98:4 (Sch.). Neither has the peaked window that Nichia's '538 and '784 patents claim. Ex. 16, Tr. 209:5-211:9 (Smi.); Krosin Decl., Ex. 17 (Sch. Inf. Rpt.) at 18.



1 Additionally, as Nichia admits, the '538 and '784 patents claim two rectangular
 2 features on the rear of the LED package that Seoul's 902 series LEDs do not have. (Nichia Mot.
 3 at 9); Ex. 11, 100:1-101:2 (Kis.); Ex. 15, Tr. 208:10-18 (Sch.); Ex. 17, 57:6-13 (Tom.); Kim
 4 Decl., Updated Ex. LL, (Fla. Rpt.) at 32-33. Nichia's '538 and '784 patents show electrodes
 5 flush with the body of the LED. *See* Kim Decl., Ex. Y, (Dep. Exs. 11, 13). Seoul's 902 series
 6 LEDs are not flush but extend below the body, as depicted below:



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 12 Finally, Nichia's '538 and '784 patents also claim electrodes with rounded
 13 corners - the '538 (first embodiment) with a greater radius of curvature and the '784 with a
 14 smaller one. Ex. 20, (Fla. Reb. Rpt.) at 25, Fig. 11. Seoul's electrodes do not have rounded
 15 corners with any radius at all, but are clipped and straight angled and therefore different than
 16 Nichia's claimed designs.

